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Supreme Court, U.S.
FILED
SEP 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-369

UNITED STATES SUPREME COURT
October Term, 1986

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Appellants,

v.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Appellees,

On Appeal from the
United States Court of Appeals
for the Ninth Circuit

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the Court of Appeals properly struck down an Arizona law which imposed a condition on eligibility for state funding making ineligible any agency that, even with separate, private or federal funds, engages in constitutionally protected but disfavored activities, including abortion services, counseling and referrals.

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MOTION TO AFFIRM

Appellees move, in accordance with Rules 16.1(c) and 16.1(d) of this Court's Rules, to affirm the judgment of the Court of Appeals for the Ninth Circuit. As we show, the questions on

which the decision of this case depend are so insubstantial as not to require briefs on the merits or oral argument for their resolution.

The judgment below was clearly correct. The court of appeals, in affirming the grant of summary judgment to appellees, did no more than apply well established principles concerning penalties on the exercise of First Amendment rights, to the undisputed facts found by the district court on remand.

STATEMENT OF THE CASE

The Act

This case arises out of a footnote appended by the Arizona Legislature to its 1980 appropriation to the Arizona

Department of Economic Security. Ariz. Laws 1980, Ch. 244, subd. 25.1/

The appropriation at issue imposes two separate conditions on all state funding for any program. First, it precludes state monies from being spent on abortion-related activities; and second, it restricts eligibility for state money only to those entities which do not, even

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1/ The statute reads as follows:

> No state money may be spent by the Department of Economic Security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals. These restrictions are not applicable when it is necessary to save the life of a pregnant woman.
>
> No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the Department of Economic Security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedures, counseling for abortion procedures or abortion referrals. Governmental agencies or entities are exempt from the restrictions in this paragraph. Ariz. Laws 1980, Ch. 244, subd. 25.

with private funds, offer abortion services or abortion counseling or referrals.2/

2/ These sections were not treated as severable by either the district court or the court of appeals, nor did the State ever contend that they were severable. The statute was ultimately invalidated in its entirety because of the unconstitutionality of the second section. Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) ("Planned Parenthood II"). The court of appeals upheld the restriction in the first section, Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) ("Planned Parenthood I"). Planned Parenthood has filed a conditional cross-appeal to this Court, pertaining to the first section of the statute, to assure that, if jurisdiction is noted with respect to the State's appeal, the questions presented to the Court will include issues related to both sections of the statute. See Planned Parenthood's conditional cross-appeal, docketed Sept. 5, 1986.

The only private entities affected by this statute are appellees Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona; and the evidence shows, in fact, that the purpose of the appropriations restriction was to preclude Planned Parenthood or any of its affiliates from receiving any state grants, contracts or benefits until it restricted (to some indefinite extent) its abortion-related activities -- including certain non-pejorative speech about abortion.3/

3/ The record below shows that, in its 1979 appropriation, the Arizona Legislature enacted a funding restriction which stated: ". . . [N]o state general fund monies may be appropriated to Planned Parenthood or any of its affiliates." The Arizona Attorney General issued an opinion that this restriction was unconstitutional, prompting the Legislature to attempt to accomplish the same end indirectly, through passage of the legislation here at issue. See, Wallace v.

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Planned Parenthood of Central and Northern Arizona and Planned Parenthood of Southern Arizona (hereinafter Planned Parenthood) are Arizona nonprofit corporations. They offer family planning services, and comprehensive counseling on all pregnancy options including abortion and, when appropriate, abortion referrals. Planned Parenthood of Central and Northern Arizona also offers first trimester abortions. Dr. Bashaw was, at the time this action was commenced, the Medical Director of Planned Parenthood of Central and Northern Arizona, and was thus directly

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Jaffree, ___ U.S. ___, 105 S. Ct. 2479 (1985) (legislation of preceding year mandating periods of silence for meditation in all public schools motivated by same religious purpose as subsequently enacted statute permitting periods of silence for meditation or voluntary prayer).

involved in providing counseling and other abortion services to Planned Parenthood's patients.

This case arose when Planned Parenthood sought state funds in 1980 for a 10% matching grant for family planning services under Title XX of the federal Social Security Act, 42 U.S.C. 1397 et seq. During the period relevant to this suit, the federal government reimbursed the State for 90% of expenditures made for qualified family planning services, requiring the providing agency to secure a 10% matching grant from state or private sources. 45 C.F.R. §§ 228.53-54 (1978) (recodified 1980, repealed 1981).4/

4/ The federal matching fund program under Title XX has been discontinued. 42 U.S.C. § 1397a(a)(1) (Supp. III 1979), amended by 42 U.S.C. § 1397(a) (Supp. V 1981); 45 C.F.R. § 288.70 et seq. (1978) (recodified 1980; repealed 1981).

In order to comply with the Arizona law, the Arizona Department of Economic Security withheld state funds from Planned Parenthood because of Planned Parenthood's known association with abortion and open discussion about the abortion option in its other programs. (Planned Parenthood continued to receive federal Title XX monies, however, by using private funds for the 10% matching requirement.) Planned Parenthood brought suit to enjoin enforcement of this restriction.

Subsequent to 1980, the Arizona Legislature has not reenacted this appropriations rider, nor is the federal matching fund program currently available under Title XX. 42 U.S.C. § 1397a(a)(i) (Supp. III 1979), amended by 42 U.S.C. § 1397(a) (Supp. V 1981); 45 C.F.R. § 288.70 et seq. (1978) (recodified 1980; repealed 1981).

There is currently no state money available for family planning or pregnancy counseling services. However, pursuant to the preliminary injunction issued in the district court on October 6, 1980, Planned Parenthood received $4,700 from the State which, presumably, it would be required to return if this Court were to reverse the Ninth Circuit.

Proceedings Below

On October 6, 1980, after an evidentiary hearing, the district court preliminarily enjoined the State from enforcing the statute, and ordered the State to provide the 10% matching funds to Planned Parenthood.5/ On February 9, 1982,

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5/ Emergency appeals were taken by the State, seeking a stay on enforcement of the preliminary injunction. The Ninth Circuit Court of Appeals denied the application; the U.S. Supreme

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the district court issued a permanent injunction declaring the footnote unconstitutional because it infringed Planned Parenthood's freedom of speech and privacy rights, and was void for vagueness. Planned Parenthood v. Arizona, 537 F. Supp. 90 (D. Ariz. 1982) (see Appendix D to State's Jurisdictional Statement).6/ This decision was appealed to the Ninth Circuit Court of Appeals.

On October 18, 1983, the circuit court reversed and remanded, Planned

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Court granted a stay on December 18, 1980. After briefing, the stay was vacated on January 12, 1981.

6/ The district court did not differentiate between the limitation on abortion speech with state monies contained in paragraph one of the statute, and the limitation on abortion speech even with private monies contained in paragraph two. It found both to be unconstitutional limitations on free speech under the First Amendment, unjustified by any state interest. 537 F. Supp. 90.

Parenthood I, 718 F.2d 938 (9th Cir. 1983) (see Appendix C to State's Jurisdictional Statement), holding that the first section was constitutional on the grounds that the state could promote the "choice" for childbirth by requiring state-funded pregnancy counseling programs to make childbirth more attractive by withholding information about abortion.7/ However, the Ninth Circuit, examining the statute

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7/ The Ninth Circuit did not address the free speech or privacy right of women patients who would, unknowingly, receive one-sided, biased information. Indeed, the court of appeals, in seeking to justify its ruling in Planned Parenthood I, found -- apparently, as a matter of fact -- that the first paragraph of the statute "has imposed no restrictions on access to abortions or the free flow of information concerning abortion," Planned Parenthood v. Arizona, 718 F.2d 938, 944 (9th Cir. 1983) (see Appendix C to State's Jurisdictional Statement). The record before the Ninth Circuit contained nothing to support this conclusion. See · conditional cross-appeal of Planned Parenthood, docketed Sept. 5, 1986.

as a whole, held that the second restriction on eligibility appeared to constitute a penalty on the named plaintiffs' First Amendment activities. Accordingly, it remanded the case to the district court, ordering the State of Arizona to prove that total ineligibility for all state funds was the only way to insure that Planned Parenthood would not use any state money to support abortion activities. Planned Parenthood I, 718 F.2d at 942-46.8/ On remand, in the district court, Planned Parenthood submitted undisputed affidavits and deposition evidence showing that its total exclusion from all state funding was not the only way to segregate

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8/ In Planned Parenthood I the court overturned the district court's ruling that the restriction was void for vagueness. Planned Parenthood's petition for rehearing was denied on December 12, 1983. See conditional cross-appeal of Planned Parenthood, docketed Sept. 5, 1986.

state funds from private funds. The State presented no evidence whatsoever on the issue of impossibility of monitoring9/, and, in an unpublished opinion, the district court entered summary judgment in favor of Planned Parenthood. (See Appendix B to State's Jurisdictional Statement.) This decision was then appealed to the circuit court. On May 15, 1986, the Ninth Circuit, after reviewing the facts de novo, affirmed the district court and held the statute unconstitutional in its entirety because it penalized protected First Amendment activity. Planned Parenthood II, 789 F.2d 1348 (9th Cir. 1986)

9/ The State's only contention in the district court was that it had "proven" that Planned Parenthood of Central and Northern Arizona had violated the footnote's restrictions, and that the case was therefore "moot." Both the district court and the court of appeals rejected these unfounded assertions.

(see Appendix A to State's Jurisdictional Statement).

The State thereafter filed a notice of appeal to this Court. On August 6, 1986, Planned Parenthood received the State's Jurisdictional Statement. As there were apparently certain deficiencies in that document, the State served Planned Parenthood with a new Jurisdictional Statement on September 4, 1986.

REASONS WHY THE MOTION TO AFFIRM SHOULD BE GRANTED

I. THERE IS NO FEDERAL QUESTION OF SUBSTANTIAL MERIT; THIS COURT HAS CONSISTENTLY INVALIDATED STATUTES WHICH CONDITION ELIGIBILITY FOR GOVERNMENT FUNDS ON FORGOING CONSTITUTIONAL RIGHTS

The decision by the circuit court should be affirmed because it is consistent with this Court's repeated pronouncements that the State "may not deny a [government] benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech." Perry v. Sinderman, 408 U.S. 593, 597 (1973).

The Arizona statute imposes a classic penalty; indeed, it is one of the "extreme examples [that] are seldom ones that arise in the real world of constitutional rights." Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 908 (1982)

(Rehnquist, J. dissenting). Under the funding restriction, only those entities which do not engage in abortion-related activities, including speech, are eligible for state grants, benefits or contracts. The State of Arizona takes the position that this penalty is constitutional because it furthers the State's interest in promoting childbirth, and it ensures that no private entity which contracts with the State is "identified" with disfavored abortion-speech activities. (State's Jurisdictional Statement at 15) The only way Planned Parenthood would ever be eligible for a state contract in Arizona under this restriction would be for it to stop providing abortions, and to limit to some uncertain extent freely discussing abortion -- including giving full information about all legal options in its counseling and referral services. Planned Parenthood would also have to give up its

federal Title X family planning funds, since federal regulations require that family planning providers receiving Title X funds make all medically necessary referrals -- including abortion referrals. 42 U.S.C. § 300 et seq.; 42 C.F.R. § 595. See, Valley Family Planning v. State of North Dakota, 661 F.2d 99 (8th Cir. 1981).

There is no substantial federal question presented by the State's appeal.10/ The State cites no Supreme Court or other precedent that supports the imposition of a penalty on the exercise of

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10/ The United States government, in a case involving some of the same issues, agrees with the position of Planned Parenthood and the circuit court here: That it would constitute an unconstitutional penalty to condition eligibility for government grants on an applicant forgoing abortion speech. Alan Guttmacher Institute v.

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First Amendment or other constitutional rights. Indeed, this Court has held that:

> "For at least a quarter century, this court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech." Perry v. Sinderman, 408 U.S. 593, 597 (1972).

See also Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Keyishian v. Board of Regents of the University of New York, 385 U.S. 599, 605-6 (1967); Shapiro v. Thompson, 394 U.S. 618 (1969); and

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McPherson, 616 F. Supp. 195, 205 n. 9 (S.D.N.Y. 1985), appeal docketed 86-6075 (2d Cir. April 15, 1986).

Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707 (1981).

More recently, in F.C.C. v. League of Women Voters, 104 S. Ct. 3106 (1984), this Court struck down a federal statute which banned editorializing by public broadcasting stations which receive federal grants, ruling that the stations were impermissibly forced to choose between ceasing to broadcast editorials and "giving up a substantive abridgement of important journalistic freedoms which the First Amendment jealously protects." 104 S. Ct. 3106, 3129. This case demonstrates the vigor with which this Court guards against restrictions on even arguably content-neutral subsidized speech. Indeed, the dissenting justices in F.C.C. indicated that if the speech restrictions in F.C.C. had been like the Arizona statute -- that is, imposed as a condition on eligibility, and viewpoint-based --

they would agree on its unconstitutionality. The dissent noted that government may not attach any "conditions to its largess when exercising its power to allocate its own public funds . . . ," nor may it make viewpoint-based distinctions "aimed at the suppression of dangerous ideas." F.C.C. v. League of Women Voters, 104 S. Ct. 3106, 3132. (Rehnquist, J., dissenting). See also Cornelius v. NAACP Legal Defense Fund, 105 S. Ct. 3439 (1985).11/

The issue presented by this statute was addressed in Harris v. McRae, 448 U.S. 297 (1980), where this Court observed that if the Hyde Amendment went further than not funding therapeutic

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11 In Cornelius, the Supreme Court held that it would be unconstitutional to exclude certain groups from the benefit of being included in the federal campaign fund if such exclusion was "impermissibly motivated by a desire to suppress a particular point of view." 105 S. Ct. 3439, 3455.

abortions, and sought to cut off all Medicaid benefits "from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion," that disqualification would be "analogous" to the legislation struck down as a penalty for the exercise of constitutional rights in Sherbert v. Verner, 374 U.S. 398 (1983). Harris v. McRae, 448 U.S. 297, 371, n. 19. Consistent with this ruling, federal district courts in North Dakota and Illinois have invalidated as unconstitutional statutes similar to the Arizona statute. Valley Family Planning v. State of North Dakota, 489 F. Supp. 238 (D. N.D. 1980), aff'd on other ground, 661 F.2d 99 (8th Cir. 1981); Planned Parenthood Association, Chicago

Area v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983).12/

12/ In Valley Family Planning, a state statute sought to deny all governmental funding to any family planning agency which performed, referred, or encouraged abortion, irrespective of whether any governmental funds were actually used for abortion-related purposes. The district court, finding that "a recipient of governmental benefits, such as Valley Family Planning, may not be required to surrender a constitutional right in order to obtain a benefit," 489 F. Supp. 238, 242, held the statute unconstitutional as an unwarranted abridgment of plaintiff's free speech rights. Similarly, in Kempiners, the court struck down an Illinois statute which disqualified from state funding all organizations which provided abortion counseling or referral services, holding that the statute constituted an unconstitutional penalty, as well as violating privacy and First Amendment rights. 568 F.Supp. 1490, 1499. The court declared:

> "[This case is] dramatically different from the facts of Harris v. McRae, 440 U.S. 297, 100 S. Ct. 2671, 65 L.Ed.2d 784 (1980), or Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977), where the state refused to fund

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II. THE HATCH ACT CASES RELIED ON BY THE STATE DO NOT CHANGE APPLICABLE PRINCIPLES OF CONSTITUTIONAL LAW

The State rests its entire argument that there is a substantial federal question on the ground that the circuit court in Planned Parenthood I flaunted purportedly directly applicable precedent in the Hatch Act cases.13/ The State asserts (State's Jurisdictional Statement

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> abortion services but did not disqualify applicants for state funds from receiving any other type of funding simply because they wished to have abortions." 568 F. Supp. 1490, 1495.

See also, Planned Parenthood Chicago Area v. Kempiners, 700 F.2d 1115, 1123-25 (7th Cir. 1983) (Cudahy, separate opinion), vacating and remanding, 531 F.Supp. 320 (N.D. Ill. 1981).

13/ The State refers to the following cases, which upheld the Hatch Act, and which Planned Parenthood will refer to collectively as "the Hatch Act cases": Oklahoma v. Civil Service Comm'n., 330

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at 11) that the Arizona statute involves a policy choice "identical" to the one in U.S. Civil Service Comm'n v. National Association of Letter Carriers, 413 U.S. 548 (1973), which involved the Hatch Act's prohibition against federal employees engaging in certain forms of partisan political activity. In order to support this analogy, the State argues that once it contracts with a private entity, that entity becomes a state agency and its employees become state employees.14/ (State's Jurisdictional Statement at

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U.S. 127 (1947); Civil Service Comm'n. v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

14/ If this were so -- that is, if Planned Parenthood became a state agency by virtue of its receipt of these funds -- then Planned Parenthood would be exempted from the statute's restrictions, since the legislation specifically exempts "governmental agencies or entities" from its reach.

10-11). The State argues, in effect, that the circuit court in Planned Parenthood I was precluded from applying any degree of judicial scrutiny to the funding restrictions, and that therefore the Ninth Circuit remand on the issue of whether the absolute disqualification on eligibility was necessary, was purportedly error.

This argument is novel, and would overturn the considerable case law recognizing the responsibility of the federal courts to engage in judicial scrutiny. The Supreme Court, in cases involving similar statutes using similar means to achieve identical state purposes, has subjected such statutes to careful judicial scrutiny. Compare, Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297. Indeed, the Hatch Act cases themselves (even if they had any applicability here), illustrate the careful scrutiny applied to such restrictions -- scrutiny

consistent with that undertaken by the lower courts in the present case. In addition, contrary to the State's assertion, the Hatch Act cases are easily distinguishable in at least three ways.

First. The decisions issued by the Supreme Court upholding the Hatch Act prohibition against public employees engaging in partisan political activities have, consistently, made clear that such restrictions would be impermissible if they were not applied in an evenhanded manner -- that is, if the prohibition of political activity was dependent upon the content of the speech or the point of view sought to be expressed. Thus, in Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Supreme Court, in upholding the statute, held:

> "[The statute] is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and

> Fourteenth Amendments. But at the same time, [the statute] is not a censorial statute, directed at particular groups or viewpoints . . . The statute, rather, seeks to regulate political activity in an evenhanded and neutral manner." 413 U.S. 601, 616.

See also, Letter Carriers, 413 U.S. 548, 564. ("The restrictions so far imposed on federal employees are not aimed at particular parties, groups or points of view, but apply equally to all parties and activities of the type described."). In contrast, the Arizona statute is aimed only at suppressing nonpejorative abortion speech, including abortion counseling and referral.

Second. The restrictions in the Hatch Act cases were based on a finding that the legislation served a "great end" of the government -- "impartial execution of the laws" and avoidance of a political spoils system. Letter Carriers, 413 U.S. 548, 565. Here, the interest in promoting

fetal life at the expense of free speech rights is neither compelling, substantive, nor legitimate. Even accepting that the government's interest in promoting childbirth may be rational under some circumstances, Harris v. McRae, 448 U.S. 297, it cannot withstand scrutiny when the means used to achieve this end is to extinguish First Amendment rights and deliberately manipulate or withhold full information about constitutionally protected medical options. Carey v. Population Services International, 431 U.S. 678, 712-717 (1977) (Stevens, J., concurring); Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S. Ct. 2169, 2178-80 (1986); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

Third. In the Hatch Act cases, ninety years of experience had shown that other remedial measures to promote a

nonpartisan civil service did not work. Letter Carriers, 413 U.S. 548, 558-564. In contrast, here, the State of Arizona did not even attempt to show (as required by the circuit court) that less restrictive means would have been inadequate to keep all state funds free from any abortion speech. Planned Parenthood I, 718 F.2d 938, 946.

In sum, the Hatch Act cases provide no support whatsoever for the State's contentions.

III. THE STATE HAS NOT SHOWN ANY ERROR IN THE COURT OF APPEALS' DECISION THAT THE STATE HAD NOT PROVEN THE IMPOSSIBILITY OF MONITORING THE USE OF STATE FUNDS. REVIEWING THE COURT OF APPEALS' FINDINGS OF FACT DOES NOT CONSTITUTE A SUBSTANTIAL FEDERAL QUESTION.15/

Subsequent to the Ninth Circuit's remand in Planned Parenthood I, the

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15/ The State's contention in this Court that "administrative impossibility" purportedly justified the cutoff of all state monies to Planned Parenthood is squarely inconsistent with the position taken by the State in the district court. The affidavit of the Director of the Department of Economic Security, William Jamieson, submitted by the State (Appendix A hereto) explained why the funding restrictions exempted agencies which provide comprehensive medical and dental care and care for the developmentally disabled. According to Jamieson:

> "Money for comprehensive medical and dental care and the developmentally retarded under the footnote in controversy is money used by the Department of Economic Security for medical and dental

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district court determined, as a matter of fact, that the State had failed to carry

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> expenses incurred by individuals who are wards of the State of Arizona. Since payments are made to doctors, hospitals and dentists who provided services to these wards throughout Arizona, it is administratively unfeasible to determine individually if each doctor, hospital or dentist does abortion or abortion-related activities. The above is the reason for distinguishing money for comprehensive medical and dental care and money for the developmentally retarded from money for family planning services." (Jamieson Affidavit, ¶ 2; emphasis added.)

In other words, in the district court, it was the State's position that "administrative unfeasibility" was the justification for excluding certain entities from the footnote's prohibition. However, in its Jurisdictional Statement, the State takes the contrary position that "administrative unfeasibility" necessitates Planned Parenthood's inclusion in the statute's prohibition. In its attempt to justify the funding cutoff, the

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its burden of establishing that it was "administratively impossible" for the State to monitor Planned Parenthood's use of state monies:

> "Subsequent to remand on this issue [i.e., administrative impossibility], plaintiffs moved for summary judgment, supported, inter alia, by affidavits, and by the deposition testimony of State officials, contending that no material fact issue precluding summary judgment existed with respect to the issue [of administrative impossibility].
>
> "Defendants have failed to present to this Court any material matter of fact with respect to the issue identified by the Ninth Circuit." January 7, 1985 Judgment of U.S. District Court (Appendix B to State's Jurisdictional Statement).

In its opinion, the court of appeals, reviewing de novo the fact findings of the district court, affirmed:

> ". . . Planned Parenthood has submitted convincing evidence on the

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(Footnote continued from previous page)

> State has thus taken, in different courts, inconsistent positions.

> feasibility of monitoring the funds. The State has not controverted that evidence and even admits that Planned Parenthood of Southern Arizona has successfully segregated state funds from its abortion-related expenditures. We hold, after a de novo review, that the district court's grant of summary judgment on the constitutionality of paragraph two of the Arizona footnote as applied against Planned Parenthood and its patients was proper." 789 F.2d 1348, 1351.

Two courts have thus, upon independent review of the factual record, concluded in Planned Parenthood's favor on the purely factual "administrative impossibility" issue. It has long been an established principle, in furtherance of judicial finality, that concurrent fact-finding by the circuit and district courts should be upheld by this Court unless "clear error is shown." Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936), citing Stuart v. Hayden, 169 U.S. 1 (1898). This Court elaborated the "two

court rule" in Graver Tank and Mfg. Co. v. Linde Air Products Co.:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact-finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

336 U.S. 271, 275 (1949), quoted with approval in Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 153 (1950); cf. United States v. Johnston, 268 U.S. 220, 227 (1924) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Here, in a de novo review of the facts upon which the district court granted summary judgment, the circuit court affirmed the district court's findings and found, "[I]t is clear that on remand the showing made by the State does not establish the impossibility of monitoring funds. Affidavits by State

officials charged with distributing the funds, which are not controverted, established that monitoring was feasible." Planned Parenthood II, 789 F.2d 1348, 1351 (emphasis added). The State does not even attempt to show the required "clear error" in the circuit court's de novo review and affirmance of undisputed factual findings in the district court. It merely asserts, without support, that there was error. The argument that this Court is thus presented with a substantial federal question is groundless.16/

16/ The State's argument that attempt to justify the total cutoff of funds is justified on "administrative convenience" grounds has been addressed by the Supreme Court. In Frontiero v. Richardson, 411 U.S. 677, 690 (1973), the Court held:

(Footnote continued on next page)

IV. CONCLUSION.

For all of the foregoing reasons, appellees respectfully submit that the appellants have presented no substantial question for the decision of this Court, and that the judgment entered in this cause by the district court (and affirmed

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> "Our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.' Stanley v. Illinois, 405 U.S. 645, 656, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972). And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality. See, Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); Kerrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S. Ct. 775 (1965)."

by the court of appeals) should therefore be affirmed.

Respectfully submitted this 15 day of September, 1986.

SACKS, TIERNEY & KASEN, P.A.

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Lawrence J. Rosenfeld
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Attorneys for Appellees

Janet Benshoof,
of Counsel

NO. 86-369

UNITED STATES SUPREME COURT
October Term, 1986

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security and ROBERT K. CORBIN, Attorney General of the State of Arizona,
Appellants,

v.

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D.,
Appellees,

On Appeal from the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO MOTION TO AFFIRM

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APPENDIX A

November 1980 Affidavit

of William Stukey Jamieson, Jr.

A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Maricopa)

I, WILLIAM STUKEY JAMIESON, JR., being first duly sworn, depose and say:

1. That I am the Director of the Arizona Department of Economic Security (DES) and a defendant in the action entitled Planned Parenthood of Central and Northern Arizona, an Arizona corporation; et al., Plaintiffs, vs. The State of Arizona, et al., Defendants, United States District Court for the District of Arizona, CIV 80-665 PHX WEC; that I have been previously deposed by the plaintiffs;

2. That money for comprehensive medical and dental care and the developmentally retarded under the footnote in controversy is money used by the Department of Economic Security for medical and dental expenses incurred by individuals

who are wards of the State of Arizona. That since payments are made to doctors, hospitals and dentists who provided services to these wards throughout Arizona, it is administratively unfeasible to determine individually if each doctor, hospital or dentist does abortion or abortion-related activities. That the above is the reason for distinguishing money for comprehensive medical and dental care and money for the developmentally retarded from money for family planning services

/s/
WILLIAM STUKEY JAMIESON, JR.

SUBSCRIBED AND SWORN to before me this _____ day of November, 1980.

Notary Public

My Commission Expires:

_____